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No. 99-1273

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., WEST OF ENGLAND SHIPOWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), CONTINENTAL INSURANCE COMPANY, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ASSURANCEFORENINGEN SKULD, LIVERPOOL & LONDON MUTUAL STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LIMITED, AND MARINE OFFICE OF AMERICA CORP.,

*Petitioners,*

*v.*

UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST AND ASBESTOS CLAIMANTS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT UNITED STATES LINES, INC. AND UNITED STATES LINES (S.A.) INC. REORGANIZATION TRUST

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## PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust (the "Trust"), a trust created by Bankruptcy Court order and Trust Agreement, does not issue shares in itself to the public, and has neither a parent nor subsidiary entities.

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## STATEMENT OF THE CASE

### A. Overview

In January, 1993, the reorganization Trust filed a comprehensive complaint in the Bankruptcy Court, seeking in significant part a declaratory judgment defining its rights under insurance policies so as to meet its obligations to seamen seeking compensation for asbestos-related claims. Those claims, manifesting and continuing to manifest well after the demise of the insured shipping companies, generated a multi-faceted coverage dispute between the Trust and all of its predecessors' insurers. The eight insurers, four domestic and four foreign, had issued policies over the forty-year period before the shipping companies' 1986 bankruptcy filing.

Asbestos illness, insidious in its long latency before manifestation, was prominently considered in the Bankruptcy Court's confirming of a 1989 plan of reorganization. The Trust was then created, in part, to obtain insurance proceeds for the ultimate benefit of thousands of existing and anticipated asbestos claimants. After the reorganization, the Trust was met with hypertechnical insurance defenses — including defenses which linked each insurer to the others — constituting an insurance maze. That insurance maze has been exploited by all of the insurers to deny or drastically limit their responsibility, notwithstanding the criticality of the insurance coverage to the 1989 reorganization plan.

Included in their 1993 summary judgment motions, the four foreign insurers each sought foreign arbitration of the dispute under foreign law, notwithstanding fundamental Bankruptcy Code strictures which dictate the needs and responsibilities of the Trust on behalf of asbestos mass tort claimants. The Bankruptcy Court denied (in pertinent part) the insurers' motions, including the effort by half of them to fragment the unified litigation into a non-comprehensive case and multiple foreign arbitrations, and deemed the adversary proceeding to be core.

Years of appeals have now resulted in the Second Circuit's well-justified decision, which readily sustains the Bankruptcy Court's detailed and painstakingly developed decision. By any reading, this is a fact sensitive, intricate, and unique case, incorporating asbestos mass tort, bankruptcy, arbitration and multi-party considerations. It is not a case which can be readily synthesized, generalized about, or applied to large classes of cases.

## B. Course of Proceedings and Disposition in the Court Below

The Trust is successor-in-interest to United States Lines, Inc. and United States Lines (S.A.) Inc. (collectively, "Debtors"), pursuant to the First Amended and Restated Joint Plan of Reorganization ("Plan"). The Plan was confirmed by order of May 16, 1989. Debtors had filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on November 24, 1986. *USL IV*, 3a.[1] Petitioners (and non-petitioning insurers), collectively referred to herein as the "defendants" or the "Clubs," each issued to the Debtors before the petition filing date certain insurance policies (the "P&I policies"). There are four domestic defendants and four foreign defendants. *Id.* The defendants issued all of the known maritime insurance coverage held by the entities that comprised the Debtors for a period of two generations. *USL I*, 76a. On January 5, 1993, the Trust initiated an adversary proceeding (the "Adversary Proceeding"), seeking a declaratory judgment defining the Trust's insurance coverage under the various P&I policies. *USL IV*, 4a. Asbestos claimants represented by The Maritime Asbestosis Legal Clinic ("MALC") intervened as plaintiffs. When the Clubs moved for

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1. The Trust refers to Petitioners' appendix and the four opinions below per the Petition ("*USL IV*" for the Court of Appeals, etc.). "Rb" refers to the extremely lengthy Bankruptcy Court record below contained in eight bound volumes and cataloged by document numbers 1-84, cited extensively in *USL II*, 49a, *et seq*. These volumes are included in the record forwarded to the Court of Appeals as "R2" (with "R" being the signal for the District Court docket numbering system).

summary judgment on a number of grounds, the foreign Clubs each demanded arbitration.

The Clubs' motions for summary judgment were, in all but one respect, denied, as were the four separate demands for arbitration. The proceeding was deemed to be "core." *USL I*, 136-37a. Defendants appealed, resulting first in the District Court's decision as to the scope of appeal, *USL II*, 49a, *et seq.*, and then its reversal of the Bankruptcy Court's core and arbitration decisions. *USL III*, 29a, *et seq.* On motion of the Trust, the District Court certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the Court of Appeals accepted the Trust's appeal and then reversed the District Court. *USL IV*, 17a.

**C. Trust Organic Documents and the P&I Policies**

The documents that are the genesis of the Trust ("Trust Organic Documents") are: (i) the Second Amended and Restated Disclosure Statement, dated February 23, 1989 ("Disclosure Statement"); (ii) the Plan; and (iii) the United States Lines, Inc. and United States Lines (S.A.), Inc. Reorganization Trust Agreement ("Trust Agreement"), dated February 23, 1990. *See* pertinent sections of the Disclosure Statement and complete copies of the Plan, Trust Agreement and Confirming Order, at Rb56 Exs. A, B, C and D, respectively. *See generally*, *USL I*, 79-80a.

The Trust, created to: (i) administer certain assets of the Debtors; (ii) resolve disputed claims; and (iii) distribute the Debtors' assets, has succeeded to all of the Debtors' right, title and interest in and to the P&I policies.[2] *USL II*, 51a; *USL I*, 79-80a. The Disclosure Statement provides in pertinent part that the Debtors "will transfer and assign to the USL Reorganization Trust substantially all their assets". Rb56 Ex. A at 34. The Plan clarifies that this conveyance includes all P&I insurance and that "[t]he USL Reorganization Trustee shall attempt to secure

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2. *See* Trust Agreement Recitals, Declaration of Trust, Art. II § 2.3 and Art. III § 3.1. Rb56 Ex. C.

for the benefit of the holders of the Personal Injury Claims all such insurance rights and Indemnification and Contribution Rights." Rb56 Ex. B at 13. Moreover, the Trust Agreement empowers the Trust "to enforce such Insurance Rights and Indemnification and Contribution Rights and to receive and retain as Reorganization Trust Assets any payments made with respect to such rights." Rb56 Ex. C at 6.

Accordingly "[t]he Reorganization Trustee shall deal with Insurers and Clubs, and make distributions to holders of Allowed Personal Injury Claims . . . as provided in the Plan. . . . The Reorganization Trustee shall release distributions from the USL Disputed Claim Reserve to holders of Disputed Claims which become Allowed Claims as provided in the Plan." Rb56 Ex. C at 7-8. Thus, the Trust is the entity intended by the Trust Organic Documents to enforce the P&I policies. *See USL I*, 79-80a.

**D. The P&I Policy Dilemma**

A maritime indemnity insurance program sits at the vortex of the confirmed plan of reorganization.[3] This insurance, as "property of the estate," provides the only mechanism for personal injury claimants of the Trust to recover cash compensation.[4] *USL I*, 80a; Rb55 ¶ 5. The vast majority of such claims, now over some 18,000, on behalf of almost 12,000 claimants, are asbestos related. *USL I*, 75-76a, as up-dated at ¶ 5 of 1996 Paulyson Affidavit attached as an exhibit to R19 (hereinafter "1996 Paulyson Aff.").

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3. As noted, over approximately 40 years, the eight Clubs insured Trust predecessors. Generally, one insurer covered a predecessor's entire fleet for a particular year. Exceptions abound, however, where certain ships were insured outside of fleet coverage by another insurer or under a different policy. Rb55 ¶ 4. *See USL I*, 79-80a.

4. The Plan dictates that distributions to pre-petition unsecured personal injury claimants are limited to certain securities issued by the reorganized entities ("Reorganization Securities") *unless* cash funds, as proceeds of the P&I policies, are forthcoming. (Plan Art. V(B)(1), (2), Art. VII (A)(1)(i)-(iv), *contained in* Rb56 Ex. B at 11, 13-14.)

Implementation of the Plan, as well as the Trust's administration, have been hampered by the following nearly overwhelming complexities:

(a) Thousands of known asbestos claimants (with additional claims yet to mature) sailed for various Trust predecessors, each claimant frequently sailing on many ships (some owned by Trust predecessors and some owned by unrelated companies) over careers of up to forty years, during which any number of different insurers covered Trust predecessor ships and those other ships pursuant to a patchwork of policy covers, rules and deductibles;

(b) Over the years, these insurers claimed different home territories, with all insurers distancing themselves from settlement efforts relating to asbestos-related claims filed in the Debtors' proceeding, and the foreign defendants maintaining their alleged inalterable and individual rights to arbitration of insurer-insured disputes in London;

(c) Asbestos-related illness, a modern class of mass tort covered by the P&I policies, was not and could not have been contemplated by the parties to the relevant insurance contracts at the time of their issue, yet over the covered years illness was developing in the bodies of effected seamen (though manifesting in largest part post-petition); and

(d) As to asbestos-related claims, the Clubs have maintained extremely technical and, from the Trust's point of view, obstructionist positions so as to stymie the clear Plan requirement that the Trust obtain cash from the P&I policies to distribute to claimants.

Rb55 ¶¶ 7 and 8; ¶¶ 5, 10, 11 and 27 of 1996 Paulyson Aff. *See USL I*, 75-81a.

**E. Declaratory Relief Sought in the Adversary Complaint**

By declaratory judgment, the Trust seeks to define Club obligations under the P&I policies.[5] The Trust seeks resolution of basic coverage issues as to the entire asbestos-related claim base, such as joint and several liability of insurers and policies, voiding Club efforts to "stack" deductibles, the propriety of a "Liman" procedure to satisfy the "pay first" provisions of the P&I policies (or Trust use of the PI Reserve established pursuant to the Plan or a similar mechanism for that purpose),[6] as well as Trust use of Reorganization Securities to satisfy deductible amounts. Rb1 ¶¶ 82-83. Declaratory relief is needed, *inter alia*, to implement the Plan and accomplish the vital purposes of the Trust. Rb55 ¶ 10. *See USL I*, 81a. The Bankruptcy Court found this to be the case, recognizing its subject matter jurisdiction over the Trust's declaratory action. *USL I*, 136-37a.

**F. Inter-Relation of Insurers' Policies and Practices**

All of the Clubs have affirmatively adopted, or refused to expressly reject, the position taken by American Club in a parallel proceeding regarding coverage "allocation" based upon an asbestos claimant's sailing history[7] as well as other

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5. In pleadings no defendant has conceded any of the relief sought by the Trust. Thus, all of the defendants deny the Trust's claims to relief at this stage of the Adversary Proceeding. Various defendants have affirmed their disputes with coverage, as alleged by the Trust. Rb57 Exs. 1 and 2. Moreover, certain defendants have raised affirmative defenses or otherwise responded in pleadings that such coverage was in doubt because of the insured's "insolvency" and the Trust's position as a would-be "assignee" of the policies. Rb57 Ex. 2. *See USL I*, 78a, 81a.

6. The nullifying effect of "pay to be paid" policy provisions in circumstances of shipowner insolvency was specifically referenced by the Bankruptcy Court, *USL I*, 78a, and emphasized by the Court of Appeals. *USL IV*, 11-12a.

7. Bankruptcy Judge Conrad summarized American Club's position regarding Prudential's successor, the PLI Trust, in (Cont'd)

factors.[8] American Club has argued, as an adjunct to its demand that applicable policy deductible amounts should be "stacked," that each such policy is only to be the source of a portion of the indemnification. The Trust seeks joint and several policy exposure.

By Club dictate, the asbestos claim resolution process thus includes a linkage among each and every potentially applicable P&I policy.[9] Emanating from this linkage is the complexity of

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(Cont'd)

*In re Prudential Lines, Inc.*, 148 B.R. 730, 743 (Bankr. S.D.N.Y. 1992), *aff'd in part, rev'd in part*, 170 B.R. 222 (S.D.N.Y 1994), *appeal dismissed*, 59 F.3d 327 (2d Cir. 1995), as an allocation

> pro rata according to each claimant's sea service and exposure on PLI and other insured vessels. . . . Under this theory, if more than one policy is triggered, the Club need indemnify PLI only to the extent that exposure occurred on any given insured ship during its policy period. All triggered policies would then contribute to indemnify PLI for amounts paid according to the amount of time a particular seaman spent on PLI vessels as a proportion of the time he was exposed to asbestos. Each triggered policy would contribute in proportion to its policy limit to indemnify Trustee for the loss.

Judge Conrad's rejection of American Club's argument in favor of joint and several liability of each policy, *id.* at 744-45, was affirmed on appeal by the District Court. 170 B.R. at 233-36.

8. Adding to the bewildering complexity of the allocation approach, is the Clubs' argument that the Trust would have to seek out other allocate sharers of liability beyond other ship owners. That is, the Trust (rather than the Trust's indemnity insurer) would be obligated to claim against land-based co-tortfeasors such as manufacturers, suppliers and installers, in order to develop any comprehensive claim settlement. Rb55 ¶ 10.

9. Judge Conrad noted the existence of a multi-national entity composed, as of 1984, of fifteen major insurers, known as the International Group of Protection and Indemnity Associations ("International Group"), whose members act in concert through reinsurance or pooling agreements. *USL I*, 78a; *see also* J. Iain Murray, *The Protection & Indemnity Club and Bankruptcy: An English Perspective*, 59 Tulane L. Rev. 1445, 1449 (1985).

dealing with all insurers and other parties-in-interest to resolve but a single claim — given the typical seafarer's long sailing career.

The Trust also links all policies, but in a different manner. The Trust identifies the issuer of that policy covering a particular asbestos claimant having the lowest deductible amount as the primarily liable insurer. *See, e.g.*, Rb1 ¶ 29. Nevertheless, the Trust claims the right to indemnification, on a contingent basis, against each Club and every P&I policy that provided coverage to a Trust predecessor at any time, relative to each and every asbestos claimant.[10] *See* Rb1 ¶ 47. In the event the responsible Club and/or the P&I policy does not fund a settlement or judgment for any reason (including, *e.g.* insurer insolvency or the exceeding of a particular policy's limit), then the Trust would seek recourse against other equally liable Club(s).

**G. Plan Provisions Relevant to Litigation of the Adversary Proceeding in the Bankruptcy Court**

The Trust remains accountable to the Bankruptcy Court, which has retained jurisdiction over implementation of the Plan. "Notwithstanding confirmation of this Plan, the Court shall retain jurisdiction for the following purposes: . . . adjudication of any causes of action . . . brought by . . . the USL Reorganization Trust or other successor of any of the Debtors as the representative of the estates of the Debtors." Rb56 Ex. B at 20.[11] Moreover, the Plan explicitly directs the Trustee to litigate with the Clubs if the Clubs refuse to cover the Trust's exposure to asbestos-related claims.[12] Fundamental to the Plan

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10. This position is consistent with *In re Prudential Lines*, *supra*.

11 Judge Conrad recognized this jurisdictional retention provision of the Plan. *See USL I*, 93-94a; *see also* Rb56 Exh. B at 20.

12. Plan Article VII(A)(1)(ii) provides, in part:

> [T]he Club shall fund the portion of the Allowed Claim equal to the Allowed Excess P.I. Claims. To the extent any Club shall refuse to consent to such a program, the **USL Reorganization Trustee is authorized and directed to**

(Cont'd)

is the intent to facilitate asbestos claimant access to insurance coverage, with the Trust as the vehicle to garner insurance proceeds. *See* Plan Art. VII(A)(1)(i), *contained in* Rb56 Ex. B at 13-14.

## H. Organic Injunctions and Other Pertinent Adjustments in Claimants' Rights

Personal injury claimants have been subject to a series of injunctions against litigation with the Debtors' estate, the reorganized entities, and the Trust. In sum, throughout the period of the record in this matter a permanent injunction barred litigation by all claimants against the reorganized entities, while a persisting injunction — subject to applications for relief — assured that the Trust will not be sued by personal injury claimants while settlement efforts are on-going.[13] For a detailed history of these injunctions, *see* Rb53 at 12-14.

In addition to the limitation on their rights to sue, personal injury claimants are not entitled to receive cash other than as proceeds of insurance. Rather, they are to receive Reorganization Securities, described in various sections of the Plan. *See* Rb56 Ex. B. *See also* Rb56 Ex. A at 26-28. Thus, cash payments are to be derived solely from the P&I policies. *See USL I*, 80a.

In sum, the rights of thousands of current asbestos claimants and future claimants have been adjusted by

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(Cont'd)

> **bring suit against the Club and to take all reasonable steps to obtain the benefits of Insurance** above the deductibles and the reimbursement of defense costs exceeding the applicable deductible, including the making of cash payments of Allowed Excess P.I. Claims.

Rb56 Ex. B at 14 (emphasis added).

13. On June 30, 1997 the Bankruptcy Court lifted the injunction barring litigation against the Trust by then existing MALC Asbestos Claimants.

Bankruptcy Court ordered restructuring, premised upon access to the P&I policies ("property of the estate").[14]

## I. Summary

The Clubs refuse to acknowledge coverage of asbestos claims, coverage essential to the Trust's implementation of the Plan. That refusal takes the form of an "insurance maze,"[15] including a singular view of P&I policy provisions — such as "pay first" — which directly affects the administration of insolvent estates and the core function of asset allocation among creditors. *See USL IV*, 11-12a. That uniform refusal forms the basis for the Trust's declaratory judgment Adversary Complaint. *See USL IV*, 4a; *USL I*, 80-81a.

Given the complexity of this dispute, the Trust takes the position that only a court hearing at one time all issues pertaining to all parties in interest, can resolve the important matters raised in the Adversary Proceeding. The Bankruptcy Court is empowered to hear these issues, which go to the core of this reorganization and involve fundamental bankruptcy principles. Fragmented and multiple arbitrations would run counter to reason and offend the very purpose of the Bankruptcy Court in this case. The Bankruptcy Court, upon thorough review of the

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14. Consider the following illustration of but one aspect of the Clubs' uniform position abrading the Bankruptcy Code: no Club will concede that Plan created Reorganization Securities *pro rata* distributed will satisfy the payment of deductible requirements of the P&I policies. Yet the Trust cannot provide cash to pay deductibles, and the use of securities such the Reorganization Securities here, is a fundamental tool of Bankruptcy Code reorganizations. *See* 11 U.S.C. § 1123(a)(5)(J).

15. The "maze" consists of hyper-technical policy interpretations, such as: forcing the insured to obtain agreement from all potential sources as to apportionment of liability; stacking of deductibles according to different theories; refusal to recognize accepted Liman-type payment plans; resistance to the Trust's use of Reorganization Securities to satisfy deductible amounts; unjustified set-off claims; refusal to acknowledge the Trust as successor to the P&I policies (or even that an insolvent could remain insured); and like efforts to eliminate or minimize insurance coverage. *See, e.g.*, Rb55 ¶¶ 10 and 15.

applicable law and unique facts of this case, determined this matter to be "core" and not appropriate for a melange of limited litigation and multiple fragmented arbitrations. The Court of Appeals, in reversing the District Court's contrary determination, reviewed and supported the Bankruptcy Court's analysis and findings.

## REASONS FOR DENYING THE WRIT

## I.

## THE SECOND CIRCUIT'S DECISION THAT A COMPLEX BANKRUPTCY LITIGATION IS "CORE" WHEN IMPLICATING PROPERTY OF THE ESTATE IN THE FORM OF INSURANCE POLICIES FUNDAMENTAL TO REORGANIZATION AND ASBESTOS MASS TORT CLAIMS RESOLUTION, IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT, IS NOT OF GENERAL UTILITY IN CLARIFYING THE LAW, NOR IS IT READILY COMPARABLE TO DECISIONS OF OTHER COURTS OF APPEALS

### A. The Adversary Proceeding Involves a Post-Petition Dispute as to P&I Policy Interpretation in the Context of Asbestos Mass Tort, an Essentially Different Case than *Northern Pipeline*

This case is thoroughly imbued with those public rights inherent in "the restructuring of debtor-creditor relations," i.e. those "at the core of the federal bankruptcy power". *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). As such, it is "distinguishable from the adjudication of state-created private rights, such as the right to recover contract damages that [was] at issue in" *Northern Pipeline*. *Id.* Contrast: (i) the reorganization trust's efforts to implement a long-confirmed plan as to even a single newly manifesting asbestos claim, met with the insurance maze which includes challenges to the Plan fundamentals derived from the Bankruptcy Code; and (ii) a garden-variety pre-petition contract dispute.

The Adversary Proceeding, a dispute over insurance coverage, developed after confirmation of a plan of reorganization that was in significant part grounded upon that coverage. The Trust seeks, in the Adversary Proceeding, a declaratory judgment defining its rights and obligations under the Debtors' marine insurance policies, which, as property of the Debtors' estate, were assigned to the Trust. The insurance coverage is the sole source of cash funding for the vast majority of claims filed, and to be filed, in this on-going bankruptcy — i.e., those thousands of asbestos-related claims that have manifested and will continue to manifest post-petition. Thus, the matter at bar has the following bankruptcy characteristics as reflected in the Bankruptcy Code: (i) concern for "the administration of the estate" (28 U.S.C. § 157(b)(2)(A)); (ii) impact upon "the liquidation of the assets of the estate [and] the adjustment of the debtor-creditor [and] the equity security holder relationship" (28 U.S.C. § 157(b)(2)(O)); (iii) involvement with "property of the estate" (11 U.S.C. § 541(a)(1)), which is critical to a confirmed plan of reorganization; (iv) specific inclusion in the contents of a plan of reorganization as a "means for the plan's implementation," and the corresponding approval of the use of property of the estate (11 U.S.C. § 1123(a)(5) specifically, and 28 U.S.C. § 157(b)(2)(M), generally); and (v) the inherent and necessary application of the overriding effect of the statutory scheme on executory contracts (11 U.S.C. §§ 365, generally, and 363(l) and 541(c)(1)). Those basic bankruptcy characteristics together with the mass tort continuing claim manifestation context of the Adversary Proceeding, well justify the Bankruptcy Court's exercise of its statutory power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]". 11 U.S.C. § 105(a); *see also* §§ 1142(a) and (b). *See USL I*, 117a (referring to Plan implementation). The Bankruptcy Court's core holding, based upon a "strong nexus . . . between the Trust's adversary proceeding and the general reorganizational process," is likewise well-justified. *USL I*, 107a.

### B. The Adversary Proceeding Clearly and Directly Affects Reorganization Asset Allocation, Contrary to Petitioners' Characterization

Petitioners mis-characterize the Adversary Proceeding, simply concluding that it "might theoretically have an *indirect* effect" on the important bankruptcy administrative function of asset allocation among creditors. Petition at 9. Such a conclusory presentation denudes this case of its unique factual predicate (*see* Point IC, *infra*), and ignores analysis and findings below.

At the Bankruptcy Court level a thorough analysis and review of facts, centered on asbestos illness and mass tort claims in bankruptcy, resulted in the following clear finding:

> [W]e find that the Debtors' insurance policies are property of the estate earmarked for distribution to a major class of claimants. *The Debtors' P&I policies are essential to the integrity of the Trust and to the Debtors' ability to reorganize.* The strong nexus that exists between the Trust's adversary proceeding and the general reorganizational process renders this declaratory action core under 28 U.S.C. § 157(b)(2)(A) and (O). Summary judgment for the Clubs will be denied.

*USL I*, 107a (emphasis added).

Like the Bankruptcy Court, the Court of Appeals readily accepted the undisputable proposition that "major insurance contracts are bound to have significant impact on the administration of the estate." *USL IV*, 10a. The Court of Appeals then painstakingly recounted its own recent experience with the nettlesome pay-first provisions of P&I

policies as applied to insolvent insureds.[16] *USL IV,* 11-12a (citing *DiCola v. American S.S. Owners Mut. Protection & Indem. Ass'n.*, 158 F.3d 65, 75 (2d Cir. 1998)). Court analysis then developed as follows:

> In addition to the difficulties involved in paying the claims, the Trust faces a significant risk that the payment scheme ultimately employed will be deemed not to satisfy the pay-first requirement. . . .
>
> If the Trust were initially to pay the claimants with assets earmarked for other creditors only to be informed afterwards that the payments did not trigger the Clubs' indemnification obligation, the result would be an inequitable distribution among the creditors. Therefore, in order to effectuate an equitable distribution of the bankruptcy estate, a comprehensive declaratory judgment is required to determine (1) whether a chosen payment plan will trigger the indemnification obligation and (2) the amounts payable under the insurance contracts. *Thus, the declaratory proceedings brought by the Trust in this case directly affect the bankruptcy court's core administrative function of asset allocation among creditors, and for that reason they are core.*

*USL IV,* 12a (emphasis added).

The Second Circuit's solid reasoning and practical decision, borne of its own experience and supported by the Bankruptcy Court's findings, is thus not as Petitioners portray that decision.

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16. The Bankruptcy Court addressed "pay first" with particularity, early in its opinion, as follows:

> P&I policies often contain a "pay to be paid" or "pay first" provision which, in the event of a shipowner's insolvency and absent creative undertakings, may render the policies unenforceable.

*USL I,* 78a.

### C. The Fact Sensitive Predicate of the Second Circuit's Decision Limits Both the General Importance of its Core Determination and its Utility to this Court in Clarifying the Law

The case at bar has unique as well as highly complex essential facts. In this regard, the Bankruptcy Court found as follows:

> [T]here is no doubt as a matter of law that the P&I policies are property of the estate following the entry of the order for relief. And there is also no doubt, and we so hold, that the policies continue to exist as property of the estate despite confirmation of the Debtors' plan of reorganization and the transfer of the policies to a disbursement trust. *Our reasons for so holding are factual and, indeed, unique to the resolution of mass toxic tort claims in chapter 11 reorganizations. . . .*
>
> [T]he negotiation and liquidation of countless personal injury claims would have delayed confirmation of a plan for years — at the expense of other creditors and general policy goals favoring prompt corporate rehabilitation.
>
> *Again, the unique facts of this proceeding play a key role in our holdings.* Asbestos-related diseases are insidious and late-manifesting, thereby necessitating the existence and maintenance of a claims allowance process to compensate individuals whose injuries manifest anywhere from ten to forty years following initial exposure. Here, the Plan created the Trust to manage the special administrative concerns inherent in any chapter 11 case involving a large number of insidious personal injury claims.

*USL I,* 104-106a (emphasis added; footnotes omitted).

The case at bar is thus difficult to abstract, cannot be readily "boiled down" as Petitioners would offer (Petition at 2-3), and

is not an apt instrumentality for the grand and general review of the law of bankruptcy sought by Petitioners.

**D. Judge Calabresi's Assessment That This Case Is Not the Appropriate Vehicle for Court Development of the Standard for Determining Whether All or Only Certain Post-Petition Breaches of Pre-Petition Contracts Are Core, Is Instructive**

The three distinguished Court of Appeals Judges differed in their approach to "core", each suggesting his own formulation in matters of post-petition breach of pre-petition contracts. *See USL IV*, 9-10a, 18-22a, and 23-24a. However, Judge Calabresi made the clear point that this case in not the one in which general core law should or need be developed since "[l]ike Judges Walker and Newman, I have no doubt that this particular post-petition breach of a pre-petition contract is core. That is all I need to decide the instant case." *USL IV*, 24a.

His Honor's point is respectfully offered here in opposition to the Petition.

**E. The Second Circuit's Essentially *Sui Generis* Core Decision Is Not Readily Comparable to Core Decisions of Other Circuits in Order to Evaluate the Degree or Significance of Conflict among the Circuits**

There are Court of Appeals cases which would appear to conflict on the methodology for determining "core".[17] Whether, or the degree to which "matters concerning the administration of the estate" and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor creditor . . . relationship" have core vitality independent of a substantive

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17. *E.g.*, *compare and contrast*, on the one hand, *In re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987) and *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1399-1400 (2d Cir.), *vacated on the other grounds*, 498 U.S. 964 (1990), *opinion reinstated*, 924 F.2d 36 (2d Cir.), *cert. denied*, 500 U.S. 928 (1991), with *In re Wood*, 825 F.2d 90 (5th Cir. 1987) and *In re U.S. Brass Corp.*, 110 F.2d 1261 (7th Cir. 1997).

remedial Bankruptcy Code created right, would thus appear to be at issue. *See* 28 U.S.C. §§ 157(b)(2)(A) and (O).[18]

However, the Second Circuit's decision here, factbound and clearly Bankruptcy Code-dependent, does not in an illuminating sense reflect conflict among the Circuits.

*Sub judice*, the Trust's bankruptcy specific and bankruptcy transformed causes of action would not continue to exist in a simple contract action under state law. Indeed, the Bankruptcy Code expressly overrides state and foreign law provisions that would, outside of bankruptcy, vitiate bankruptcy-preserved or created causes of action.[19] (Congress may, within its constitutional limitations, alter and adjust state law entitlements in bankruptcy pursuant to its Bankruptcy Clause power, U.S. Const. art. I, § 8, cl. 4.) And, the Bankruptcy Code-dependent nature of this proceeding is not severable from its mass tort context.[20]

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18. Similarly, whether or the degree to which courts address the non-exclusivity of the § 157(b)(2) core list and the statutory admonition that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law", 28 U.S.C. § 157(b)(3), distinguishes cases.

19. *See generally* 11 U.S.C. §§ 363(1), 365, 541(c)(1), 1123(a) and 1142(a); *see also* §§ 105(a), 362(a) and 1141.

20. The continuing manifestation of "late-filed" claims, also a function of the extended bankruptcy proceeding, requires consistent ongoing oversight by the Bankruptcy Court of the entire process. *See generally*, *In re Manville*, 36 B.R. 743, 757-59 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234 (S.D.N.Y. 1984). This fact was envisioned by both the drafters of the Plan and the Bankruptcy Court. *See* Disclosure Statement III(F)(2)(c)(i); Plan Art. VII(A)(1)(iv), *contained in* Rb 56 Ex. B at 14; Confirming Order ¶ 28(x), *contained in* Rb 56 Ex. D at 23. This regime necessarily includes jurisdiction and control over the insurance policies, which includes control over the Clubs. *See generally*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) (addressing the need to effect, comprehensively, a "fair and efficient means of compensating victims of asbestos exposure"); *Keene Corporation v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993) (chastising

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Consider the following significant continuing effects upon the rights and obligations of the Debtors, the asbestos claimants and the Clubs, resulting from the filing and continuation of this bankruptcy case, the confirmation of the Plan and specific applications of the Bankruptcy Code:

(i) The Debtors have been discharged of all obligations, including those due asbestos claimants (11 U.S.C. § 1141; Plan Art. VIII, *contained in* Rb 56, Ex. B at 19; Confirming Order ¶ 7, *contained in* Rb 56, Ex. D at 11-12);

(ii) The Trust has been created as the mechanism to deal with all claims (Plan Art. VII(A), *contained in* Rb 56, Ex. B at 13-14; Trust Agreement § 3.2, *contained in* Rb 56, Ex. C at 6-7);

(iii) Continuing injunctions had persisted, including those applicable to claimants against the Trust, barring litigation against the Trust until certain settlement efforts have been undertaken (Plan Art. VII(A)(1)(iv), *contained in* Rb 56 Ex. B at 14; April 18, 1990 Order, *contained in* Rb 56 Ex. H; Confirming Order ¶¶ 8-9, 13(x), *contained in* Rb 56 Ex. D);

(iv) "Reorganization Securities," have become the medium of compensation to unsecured creditors for allowed claims, unless such claims are the subject of insurance (11 U.S.C. § 1123(a)(5)(B),(G) and (J); Plan Art. V(B)(1) and (2), *contained in* Rb 56 Ex. B at 11);

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efforts at a mandatory class asbestos settlement, evading and in lieu of Bankruptcy Code application and a Title 11 proceeding, i.e. "the exclusive legal system established by Congress for debtors to seek relief" under such circumstances).

(v) The Debtors have been re-formed for operation post-confirmation (Plan Art. VII(B), *contained in* Rb 56, Ex. B at 14-15; Disclosure Statement Art. IV, *contained in* Rb 56 Ex. A at 18-21; Trust Agreement Recitals and Art. V, *contained in* Rb 56 Ex. C at 1, 14);

(vi) The P&I policies have become Trust property, to be used in its claim allowance and settlement functions (Plan Art. VII, *contained in* Rb 56 Ex. B at 13-18; Trust Agreement Declaration of Trust and § 2.3, *contained in* Rb 56 Ex. C at 2, 6); and

(vii) The panoply of overriding Bankruptcy Code provisions has been invoked, re-formulating otherwise applicable law and the P&I policy provisions so as to conform to federal requirements (including 11 U.S.C. §§ 363(l), 365, 541(c)(1), 1123(a)(5) and 1142(a)).

Thus, the subject *sui generis* decision leaves "no doubt that this particular post-position breach of a pre-petition contract is core."[21] *USLIV*, 24a.

21. Petitioners' cited cases are not comparable to the subject decision in functional bankruptcy terms. Focusing on abstention issues, *see In re U.S. Brass Corp.*, 110 F.3d 1261, 1268-69 (7th Cir. 1997) (primarily involving multiple *pre-petition* insurance coverage disputes, though "for completeness" (seemingly as *dictum*) opinion recites a narrower core standard than that of the First and Second Circuits; *see* n.17, *supra*). Distinguishable as garden-variety contract (or contract/tort) claims alleging at least some component of *pre-petition* breach/tort, are: *Diamond Mortgage Corp. of Illinois v Sugar*, 913 F.2d 1233 (7th Cir. 1990) (Chapter 11 debtor sued its former lawyers alleging pre-petition acts of malpractice); *Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990) (Chapter 7 trustee's action against the debtor's former tenant to collect rents owed under pre-petition leases, and allegedly unpaid both pre and post bankruptcy petition; characterizing the action as "a garden variety contract claim", *id.* at 444, "merely for rent", *id.* at 445, the Third Circuit concluded that the Trustee's action "involving

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pre-petition contracts, allegedly breached both before and after the filing of the petition" was non-core (*id.*) and expressly limited to holding the subject facts, stating: "We are not presented with and thus do not decide whether . . . a claim only for the post-petition breach of a contract entered into pre-petition [is a] core matter[ ]." *Id.*); *In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986) (state law contract claims, apparently maturing pre-petition, asserted as counterclaims in Bankruptcy Court by a Chapter 11 debtor against a plaintiff who, pre-petition, had commenced a state court contract action against the debtor); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3d Cir. 1994) (involved the issue of whether a Chapter 11 debtor's Unsecured Creditors' Committee could intervene, pursuant to 11 U.S.C. § 1109(b), in a non-core proceeding commenced pre-petition by the debtor against its auditors seeking damages for fraud and malpractice); and, *In re Apex Express Corp.*, 190 F.3d 624 (4th Cir. 1999) (Chapter 11 debtor's post-petition action against a former customer to collect penalties for fifteen pre-petition payments allegedly paid late; held that "accounts receivable claims against strangers to the bankruptcy proceeding . . . at least when grounded in state law and arising pre-petition, must be treated as non-core", *id.* at 631). Distinguishable as alleging *pre-petition* statutory violations are: *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) (Chapter 11 trustee's action against the debtor's investment adviser alleging pre-petition violations of federal and state securities laws, and of related contractual and fiduciary duties; assertions included statutory and common law non-core causes of action for those violations, as well as core causes under 11 U.S.C. § 544(b)); and *Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990) (RICO action commenced pre-petition by two judgment creditors against an eventual Chapter 7 debtor and his son, which alleged that, prior to filing for bankruptcy, the debtor and his son had set up a sham trust in order to conceal assets). *In re Wood*, 825 F.2d 90 (5th Cir. 1987), involved only peripherally a Chapter 7 case and had no continuing bankruptcy attributes (post-petition action commenced by a co-owner of a medical clinic against his bankrupt business partner alleging that after the partner had filed for personal bankruptcy he had wrongfully issued medical clinic stock to himself in violation of their pre-petition business agreement; plaintiff did not file a proof of claim in his partner's bankruptcy proceeding). *In re Davis*, 899 F.2d 1136 (11th Cir. 1990), raised attorneys' fees issues under the Equal Access to Justice Act, 28 U.S.C. § 2412; *compare* the Second Circuit's reservation *sub judice* as to the core or non-core nature of attorneys' fees questions. *USL IV*, 12a.

## II.

## THE SECOND CIRCUIT'S APPROVAL OF THE BANKRUPTCY COURT'S REASONABLE EXERCISE OF DISCRETION TO CENTRALIZE IN A SINGLE PROCEEDING THE ADJUDICATION OF CORE INSURANCE COVERAGE ISSUES HAVING ON-GOING IMPORTANCE TO A MAJOR REORGANIZATION AND THOUSANDS OF CURRENT AND FUTURE ASBESTOS MASS TORT CLAIMANTS, IN THE CONTEXT OF A MAZE OF INTERTWINED INSURANCE POLICIES WRITTEN OVER A FORTY-YEAR PERIOD (SOME WITH AND SOME WITHOUT ARBITRATION CLAUSES), SENSIBLY ACCOMMODATES STATUTORY AND HISTORICAL BANKRUPTCY PRECEPTS AS WELL AS ARBITRATION DECISIONS OF THIS COURT

### A. The Second Circuit's Decision Supporting, in the Extraordinary Circumstances of this Case, Centralized Complex Bankruptcy Litigation in Lieu of Both On-Going Limited Litigation and Fragmented Foreign Arbitrations, Is Consistent with Decisions of this Court

The Second Circuit's holding in favor of centralized adjudication of this complex matter, is summarized by that Court, as follows:

> In the instant case, the declaratory judgment proceedings are integral to the bankruptcy court's ability to preserve and equitably distribute the Trust's assets. Furthermore, as we have previously pointed out, the bankruptcy court is the preferable venue in which to handle mass tort actions involving claims against an insolvent debtor. . . . The need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies and insurers. The bankruptcy court was not clearly erroneous in finding that "arbitration of the disputes raised in the Complaint would prejudice

> the Trust's efforts to preserve the Trust as a means to compensate claimants." It was within the bankruptcy court's discretion to refuse to refer the declaratory judgment proceedings, which it properly found to be core, to arbitration.

*USL IV*, 17a (citations omitted).[22]

Thus, all of the important underlying facts that lead inexorably to the core determination *sub judice*, support adjudication of the Adversary Proceeding. And, "[l]ike any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/ Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1970) (the "New York Convention"), "which requires the recognition of agreements to arbitrate that involve 'subject matter capable of settlement by arbitration,' contemplates exceptions to arbitrability grounded in domestic law."[23] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

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22. The Bankruptcy Court held as follows:

> Clearly, the Clubs' alleged refusal to honor prepetition insurance policies endangers the Debtors' ability to resolve, by way of the Trust, the vast number of personal injury claims filed against it because, as we have said before, the P&I polices are the Trust's primary asset. Without the Clubs' good faith participation, Debtors will be unable to implement the Plan's procedures designed to allocate portions of the Debtor's property to individual claimants. *Moreover, arbitration of the disputes raised in the Complaint would prejudice the Trust's efforts to preserve the Trust as a means to compensate claimants. We will therefore exercise our discretion and deny arbitration.* [*USL I*, 118a (emphasis added).]

23. 11 U.S.C. §§ 363(1), 365, 541(c)(1) and 1142(a) reflect a strong bankruptcy policy which voids *ipso facto* clauses and encourages (Cont'd)

*Inc.*, 473 U.S. 614, 639 n.21 (1985) (quoted in *USL IV*, 13-14a).

Again, both the Court of Appeals and the Bankruptcy Court amply cited Bankruptcy Code "chapter and verse", as well as the overarching unique and complex facts of this case, to well-justify the denial of multiple fragmented arbitration. *USL IV*, 14-16a; *USL I*, 116-118a. *Consider, inter alia*, the empowering provisions of 11 U.S.C. §§ 105(a)(c) and 1142(b), as well as 11 U.S.C. § 1123(a)(5) and Fed. R. Bank. P. 3020(d). Moreover, specific statutory sections aside, the *McMahon* standard allows the alternative inquiry into whether "[arbitration] inherently conflicts with the underlying purposes" of the competing statute. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989).[24]

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continued business relations with bankrupts. However, as Judge Conrad observed:

> With respect to at least one key issue raised in the Trust's Complaint, we note that English law differs substantially from precedent in this Circuit. Compare *Firma C-Trade SA. v. Newcastle Protection and Indemnity Assoc.*, 2 ALL E.R. 705 (1990) (holding that insolvent shipowner could not recover under P&I policies) with *Liman v. American S.S. Owners Mut. Protection and Indem. Assoc.*, 299 F. Supp. 106 (S.D.N.Y.), *aff'd*, 417 F.2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936, 90 S. Ct. 946, 25 L.Ed. 2d 116 (1970) (permitted insolvent shipowner to borrow funds necessary to satisfy policy's pay first provision). [*USL I*, 112-13a.]

Thus, Bankruptcy Code policy as evidenced by §§ 363(1), 365, 541(c)(1) and 1142(a) would likely not be enforced by various foreign arbitrators applying English law.

24. "[A] chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period'. . . ." *Katchen v. Landy*, 382 U.S. 323, 328-29 (1966) (quoting the 1845 case of *Ex parte Christy*, 3 How. 292, 312, 11 L. Ed. 603). In furtherance of this purpose, " 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts

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**B. This Virtually *Sui Generis* Decision Does Not Conflict with Decisions of Other Courts of Appeals**

Petitioners would find in the Second Circuit's arbitration decision both a "clash" with this Court's decisions (Petition at 15), and a "conflict" with other Circuits. Petition at 19. Neither is the case. Arbitration, though favored, would be *absolute* as posited by Petitioners. That view "clashes" with *McMahon's* provision for overriding the Arbitration Act's mandate in appropriate circumstances. 482 U.S. at 226. And, it is the *McMahon* standard to which all Circuits must adhere.

Rather than conflicting with Third Circuit cases, the decision here at issue accommodates and respects that Circuit's formative decision. *Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989), a *non-core* case, is first relied upon and then readily distinguished by the Second Circuit as not involving fundamental bankruptcy precepts. *USL IV*, 15-16a. Petitioners' announcement of conflict between the Second Circuit and the Fifth Circuit's *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997), is likewise contrived, tailing off before actually identifying a conflict.

Petitioners advocate (Petition at 20) as follows:

> The Second Circuit's decision is also in conflict with the Fifth Circuit, which, in *In re National Gypsum Co.*, 118 F.3d 1056, 1067 (5th Cir. 1997), also rejected the core/non-core distinction for existence of a discretion, but recognized a discretion based on the "underlying nature of the proceeding, i.e.,

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so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate'." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). And, of course, the important underlying purposes of bankruptcy law have been with us since our earliest history. Petitioners' seeming contention (Petition at 22-26) that bankruptcy purposes somehow *post-date* a 1970 treaty adoption by Congress would ignore history and treat basic bankruptcy law as if it developed with the 1978 Code revision.

> whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code."

Compare this contrived and vague assertion of "conflict", with the actuality of the Second Circuit's positive reference to the Fifth Circuit case:

> Core proceedings implicate more pressing bankruptcy concerns, *but even a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration.* "Certainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeopardize the objectives of the Bankruptcy Code." *Insurance Co. of N.Am. v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re Nat'l Gypsum Co.)* 118 F.3d 1056, 1067 (5th Cir. 1997). *However there are circumstances in which a bankruptcy court may stay arbitration, and in this case the bankruptcy court was correct that it had discretion to do so.*

*USL IV*, 16a (emphasis added).[25] In fact, the Fifth Circuit held

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25. Other cases cited in the Petition (at 19-21) as being in conflict with the Second Circuit decision simply fail to implicate any bankruptcy precept at odds with arbitration. In fact, the following cited cases are not bankruptcy cases at all: *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *In re Sedco, Inc.*, 767 F.2d 1140 (5th Cir. 1985); *I.T.A.D. Assoc., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); *C. Itoh & Co. (America) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977); and *McReary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974). Moreover, *In re Hart Ski Mfg. Co., Inc.*, 18 B.R. 154 (Bankr. D. Minn. 1982); *amended*, 22 B.R. 762 (Bankr. D. Minn. 1982), *aff'd*, 22 B.R. 763 (D. Minn. 1982); *aff'd*, 711

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that "the Bankruptcy Court was within its discretion to deny [applicant's] motion to stay under the Federal Arbitration Act." *In re National Gypsum*, 118 F.3d at 1071.

### C. This Factbound and Essentially Unique Case Has Little Utility in Articulating a General Standard Relating To Adjudication or Arbitration.

This factbound core matter calls for a single adjudication. There is no justification for cobbling together both on-going limited litigation and multiple fragmented arbitrations. This is not a simple insured-insurer dispute relating to a single or limited number of claims, nor a dispute where claims were fully manifested pre-petition. Rather, the matter at bar includes the following unique and complex features:

(i) involvement of all known insurers of Trust predecessors, covering seafarers exposed to asbestos over a 40-year period;

(ii) application to some 18,000 pending claims of almost 12,000 known claimants, and an unknown and presently indiscernible number of potential claims;

(iii) clear focus on a mass tort arising from the long-term presence of asbestos on the Debtors' ships;

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F.2d 845 (8th Cir. 1983) and *Bender Shipbuilding & Repair Co., Inc. v. Morgan*, 28 B.R. 3 (9th Cir. B.A.P. 1983), decided before *McMahon*, can't override this Court's *McMahon* standard permitting the Bankruptcy Court to refuse in certain circumstances to enforce arbitration clauses; and, no bankruptcy fundamental was espoused in these cases. *Aasma v. American S.S. Owners Mutual Protection and Indemnity Assoc., Inc.*, 95 F.3d 400 (6th Cir. 1996) involved efforts of personal injury claimants to sue directly under indemnity insurance contracts of the bankrupt; the Sixth Circuit held that the claims against a foreign insurer must be arbitrated per the policies. However, this two party dispute involved no reorganization trust nor any overlay of the Bankruptcy Code on the pre-petition insurance contracts.

(iv) allegations of injury which, if asbestos-related, can only be identified generally as the result of asbestos exposure; exact origin is not discernable by any current scientific method;

(v) impact upon a measurable part of a nation-wide litigation morass that includes at the federal level pending Multi-District Litigation ("MDL") proceedings applicable to all federal asbestos cases (as distinguished from the bankruptcy claims now pending against the Trust);

(vi) allegations that all insurers (1) refuse to settle or commit to settle asbestos claims filed against the Trust; and (2) participate in the establishment of an "insurance maze" that befuddles Trust efforts to provide cash settlements to asbestos claimants;

(vii) allegations of linkage between and among all P&I policies (with the Clubs having taken the uniform position that each policy is only *pro rata* answerable for a long-term seafarer's asbestos illness and that many policy deductibles should be "stacked," while the Trust contends that all policies covering a particular seafarer's asbestos exposure are jointly and severally liable); and

(viii) Trust efforts to define its coverage and indemnification rights with respect to asbestos claims, on an on-going basis and for the life of the Trust.

In functional terms, the above-stated facts can be readily marshaled to demonstrate the need for a single complex litigation. Conversely, no benefit would result from allowing arbitration in these special circumstances,[26] since:

26. None of the three cases relied upon by Petitioners (at 22) in (Cont'd)

(i) Four foreign Clubs, of a total of eight defendants, request arbitration; if arbitration is granted, litigation would continue, impaired by the loss of essential parties;

(ii) The presence of multiple decision-makers (several arbitrators and the Bankruptcy Court) will increase the probability of inconsistent and incomplete results;

(iii) "Linkage" exists among all P&I policies (either as advocated by the Clubs, based upon their apparent "*pro rata* liability" theory, or by the Trust, based upon its claim that all applicable policies are jointly and severally responsible to indemnify long-term seafarers' illnesses);

(iv) The "insurance maze," gleefully exploited by each Club and frustrating Trust indemnification, would be expanded by multiple foreign arbitration proceedings;

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(Cont'd)
support of their argument for the pre-eminence of a treaty, reflects the special circumstances and fundamental bankruptcy precepts here present. Neither *In re Sedco, supra*, nor *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992) involved any bankruptcy facts or considerations, while *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987) affirmed a *refusal* to enforce the New York Convention in light of a *foreign bankruptcy*. Victrix, a creditor of the bankrupt Swedish company, Salen, sought attachment here by moving pursuant to the New York Convention to confirm its English arbitration award (by default) and to enforce the British judgment. The Second Circuit upheld the District Court's denial of that motion, stating that "[i]n light of Salen's bankruptcy [the] enforcement [of the award and judgment] would conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt." *Id.* at 714. Moreover, the Court of Appeals recognized that "a case such as this one . . . takes on a public character by virtue of Salen's insolvency and the institution of the Swedish bankruptcy proceeding." *Id.*

(v) Discovery is needed from the parties who want to absent themselves from the litigation, in order to determine the scope of indemnity insurance coverage available to the Trust; and

(vi) The full range of the Bankruptcy Court's centralized control over Plan implementation and Trust administration would be hampered, as would the Bankruptcy Court's ability to coordinate its efforts in administering the mass tort claims with the MDL.[27]

This easy case in which to deny arbitration is thoroughly factbound, unique and thus not an apt basis for articulating the general law.[28]

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27. [A]t this time: (1) we invite the various bankruptcy courts to coordinate with Judge Weiner concerning identification and implementation of the means necessary to secure their mutual objectives of fair and efficient resolution of bankruptcy cases and asbestos personal injury claims; (2) we request quarterly updates from the bankruptcy courts and Judge Weiner to the Panel identifying the procedural and substantive progress towards reaching those objectives. . . .

*In re Asbestos Bankruptcy Litigation*, No. 950, 61 U.S.L.W. 2408, 1992 WL 423943, at *2 (J.P.M.L. Dec. 9, 1992).

28. Petitioners' finale, asking the Court to "ensure that the United States complies with its obligations to the other nation signatories to the New York Convention", Petition at 26, invokes "the 'international contract' talisman" in circumstances where arbitration would produce an unfair burden on the Trust and conflict with the historic purposes of bankruptcy law. *Scherk v. Alberto Culver Co*, 417 U.S. 506, 529 (1974) (dissent). *Consider id.* at 517 n.11 (majority conceding potential attenuation of foreign contacts).

## CONCLUSION

For the reasons set forth herein, the Petition should be denied.

Respectfully submitted,

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